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IN THE

Supreme Court of the United States

Number 751

OCTOBER TERM 1958

WILLIE HUGH DAILEY,

Petitioner

vs.

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

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WILLIE HUGH DAILEY,

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vs.

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Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

Now comes, WILLIE HUGH DAILEY, petitioner in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

REFERENCE TO OFFICIAL REPORT

The opinion delivered in the court below in this case is reported in 261 Fed. 2nd. 870.

GROUNDS OF JURISDICTION

1. The judgment of the Court of Appeals was entered on December 23, 1958.

2. A petition for rehearing was denied on February 11, 1959.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S. Ct. XXXIX).

QUESTIONS PRESENTED FOR REVIEW

1. When an alleged crime is committed in the presence of one Federal Narcotic Agent, (posing at the time as a merchant seaman) but no arrest is made by him—can the Government wait for two weeks, after the reasons for an arrest without a warrant have disappeared, and then have the masquerading agent, still without a warrant, accompany two other Federal Narcotic Agents to accused's home—and there these two Agents (whose knowledge of the alleged crime is hearsay) place accused under arrest without a warrant—and no crime is being committed or has been committed in their presence? And, accused is taken from his home, without being permitted to properly dress, and is then confronted with the masquerading agent (waiting in an automobile, and still posing as a merchant seaman) and these Agents then and there by trickery and psychological coercion force accused to give vital and damaging evidence against himself. Can such evidence or a confession obtained under

the circumstances of such illegal arrest and detention be used against accused on his trial when timely and proper objections are made to its admission?

2. Where a character witness is offered by the defendant, and testifies he has known the defendant for some twenty-three years—and that the defendant has visited his, (defendant's) parents weekly in the community where witness resides, and that the defendant was *"as well known as I am, living there"*—and that he had never heard the defendant's reputation discussed one way or another, was it error not to permit this witness to testify as a character witness? And, did the failure to permit his testimony deny to accused the substantial right of the defense of good character, which could have of itself created a reasonable doubt as to his guilt?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 4—United States Constitution:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner was indicted, tried and convicted on two counts of violating Section 4722, Title 26, U.S.C., all in violation of Section 5705 (a) Title 26, U.S.C. He was sentenced to serve five (5) years on each count (the mandatory penalty under the law), the sentences to run concurrently.

The evidence on behalf of the Government showed that George Gaffney, a Federal Narcotic Agent, masquerading as a Merchant Marine, made two purchases of twenty-one grain morphine tablets from petitioner in Atlanta, Georgia. One purchase on April 16th, 1957 and a second purchase on April 25th, 1957. Both purchases were made at the Lane-Rexall Drug Store at 479 Peachtree Street where petitioner was employed as a druggist. Agent Gaffney testified that on each occasion he paid petitioner One Hundred Dollars for the morphine tablets. He testified that when he made the purchase on April 25th, 1957 he paid petitioner with twenty dollar bills, and that he had made and kept a record of the serial numbers of these bills. (R. 78.) None of these bills were found on petitioner, nor were any ever traced to him. Agent Gaffney did not have a written prescription or order form for the narcotics, nor did he tell petitioner that he was ill or in need of drugs. Agent Gaffney testified that his contact with petitioner was made through a "special employee," Harold Masden, who called the Lane-Rexall Store on both occasions and made arrangements for Gaffney to make the purchases.

Agent Gaffney testified he was working with Narcotic Agents R. H. Thomas and E. R. Barber, and that these agents were in the vicinity of the drug store when the purchases were made. That on both occasions they had followed him (Gaffney) back to the Peachtree-Baker Building where he delivered the morphine tablets to them to be transmitted to the chemist.

Neither Agents Barber nor Thomas were present in the drug store when the purchases were made. Following the last purchase on April 25th, 1957, Agent Gaffney

testified he next saw petitioner on May 9th, 1957, when he accompanied Agents Barber and Thomas to the home of petitioner in Hapeville, Georgia. That petitioner came to the door and then with Agents Barber and Thomas to the automobile where he was placed under arrest and put into the automobile where Agent Gaffney (still posing as a Merchant Marine) was seated on the back seat. While they were driving from petitioner's home to the Office of the Narcotic Bureau (R. 37) petitioner was questioned by Agent Barber who asked if he had ever seen Gaffney before. Petitioner replied he had not. Agent Barber then told petitioner that they had picked Gaffney up earlier and that he had twenty morphine tablets on him which he stated he had gotten from petitioner. Petitioner again denied ever having seen Gaffney. At that point Agent Thomas asked petitioner if he would care to take a lie detector test. The evidence for the Government is that petitioner then admitted he had sold Gaffney twenty morphine tablets on two occasions and had used the money to pay bills.

On cross-examination Agent Gaffney testified they had driven petitioner directly to the Narcotic Bureau in the Peachtree-Baker Building * * * that he did not have a warrant for the arrest of petitioner * * * that anything petitioner told him that appeared important, he made a mental note of * * * for the purpose of submitting the evidence to the United States Attorney in proper form. (R. 24.)

Agents Thomas and Barber testified they did not have a warrant for the arrest of petitioner.

Dr. J. W. Quillen, chemist, testified he had received U. S. Exhibit 3 from Agent Barber on April 16th, 1957,

and U. S. Exhibit 5 from Agent Thomas on April 25th, 1957. That his analyses showed both exhibits to be one-grain morphine sulphate, a narcotic drug.

The Government did not elect to have "Special employee," Harold Masden testify in corroboration of Agent Gaffney, and this witness could not be located when a subpoena was issued for him during the trial on behalf of petitioner.

ARGUMENT.

(1) This Court has repeatedly held that the Fourth Amendment " * * * the person or things to be seized * * * ," applies to arrest as well as search warrants.

In this case no reason was ever offered by the Government as to why an arrest warrant was not obtained, therefore it must be assumed that no good or valid reason existed.

No crime had been committed in the presence of the two arresting officers; their knowledge, if any, would have had to have come from Agent Gaffney, who made the alleged purchases of morphine. This knowledge was therefore certainly hearsay.

This Court in the recent case of Giordenello vs. U. S. 78 S. Ct. 12[illegible] held that:

> " * * * The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; * * * for Finley's testimony at the suppression hearing clearly showed that he had no personal knowledge of the matters on which his charge was based. * * *

And this Court ruled that even a warrant thus obtained was not sufficient and said further:

"We hold that the seizure in this case was illegal, and that the seized narcotics should therefore not have been admitted into evidence, and that petitioner's conviction accordingly must be set aside. * * * "

How then can the Government now in good conscience say that the evidence of a confession obtained during an illegal arrest should nevertheless be admitted into evidence against an accused, but, had narcotics or some other thing or object been taken it would not be admissible?

Petitioner respectfully submits that the Fifth Circuit Court of Appeals misconstrued the arresting powers given to Agents of the Narcotic Bureau:

26 U.S.C.A. Section 7607 . . . "The Commissioner, Deputy, Assistant to Commissioner and agents of the Bureau of Narcotics and Treasury . . . may . . .

"(2) make arrests without warrants for violations of any law of the United States relative to narcotic drugs (as defined in Section 4731) or marijuana (as defined in Section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Petitioner respectfully submits the arresting powers granted to Narcotic Agents are no greater than those granted to an Agent of the Federal Bureau of Investigation:

"Title 18-3052 — Powers of Federal Bureau of Investigation:

" . . . (2) the Director, Assistant to Director, Assistant Directors, the inspectors and agents of the

Federal Bureau of the Department of Justice . . . may . . .

" * * * make arrest without warrant for any offense against the United States committed in their presence, or for any felony, cognizable under the law of the United States if they have reasonable grounds to believe that the person to be arrested, has committed or is committing such a felony."

Nor, could Congress confer powers on any arresting officers that would deprive an individual of due process under the Constitution of the United States.

In the case of United States vs. Coplon, 185 Fed. 2nd 629, (Cer. Den. 72 Sup. Ct. 362), it was held:

"(10-12) * * * Moreover, there was not the slightest need for arresting her without a warrant even if there had been danger that she might run away and hide. It is apparent that even in the morning the Bureau had decided to arrest her that day; and there was not in the least need for doing so without a warrant. No sudden emergency forced the hand of the agents; they made everything ready except the one condition which would have made the arrest lawful; a warrant. * * * The statute certainly requires a warrant when there is time to obtain one; the dispensation is limited to occasions when it is not safe to wait. * * * We have no alternative but to hold that the arrest was not valid and that made the packet incompetent against her."

The Fifth Circuit Court of Appeals in affirming the instant case commented that the 4th Amendment does not prohibit an arrest without a warrant where there is reasonable or probable cause for arrest, and cited the case of Mills vs. United States, 196 Fed. 2nd 600, (Cer. Den. 344 U.S. 828). However, the facts in the Mills case clearly show that *he was placed under arrest immediately*

for a crime committed in the presence of the officers. The officers had information that Mills was picking up lottery tickets—they observed a course of conduct for several days as Mills drove from building to building, apparently picking up number slips. When they moved into question Mills there was a sack on the seat beside him. The officer testified that he placed Mills under arrest, "as soon as I saw those number slips." In that case it was an *immediate arrest* for a crime committed in the presence of the officers, and there was neither time, opportunity nor necessity for a warrant.

In this connection, should the Government now take the position that the two arresting officers in the instant case were acting on information furnished them by Agent Gaffney, and a warrant was not necessary under the ruling of this Court in the more recent case of Draper vs. United States, 79 S. Ct. 329, and under Mills vs. United States, supra, and contend that the officers could act on hearsay information in making the arrest—be it remembered, that in both these cases the actual crime was imminent, impending and occurring in the presence of the officers *at the time of the arrest*. Therefore, the emergency and exceptions for an arrest without a warrant were present, and the dispensation was justified because of these circumstances, but

> "The statute certainly requires a warrant when there is time to obtain one; the dispensation is limited to occasions when it is not safe to wait." Judge Learned Hand, United States vs. Coplon, supra.

And, in petitioner's case, the alleged crime had been committed *two weeks prior to the arrest*—and the emergency and reasons for an arrest without a warrant had long since disappeared. There was now no sudden emer-

gency existing that could possibly have justified Agents Barber and Thomas taking petitioner from his home without a proper arrest warrant, and, in so doing they did violate his rights under the 4th Amendment of the Constitution of the United States.

The Fifth Circuit Court of Appeals in affirming the conviction in this case further said:

> "As we read the record, there is no necessary relation between the arrest and the confession. * * *"

Certainly the strange, unusual and improper circumstances of the arrest of petitioner do not support this conclusion, for there is a very definite relation between the arrest and the confession. The veiled threat of subjecting petitioner to a lie detector test as he was being taken from his home and family, without any opportunity for explanation or farewell – his not being permitted to return into the house to properly dress – and being confronted in the automobile with his supposed accomplice in the presence of federal officers – and questioned en route to the Headquarters of the Narcotic Bureau *are hardly conditions conducive to prompt a free and voluntary confession from a prisoner.* And except for the exertion of these menacing influences, the petitioner might well have remained silent, as was his legal right. There is indeed, a very definite "necessary relation between the arrest and the confession."

Many years ago this Court in discussing the test of a voluntary confession in the case of Bram vs. United States, 168 U. S. 452-543, 18 S. Ct. 183-187 had this to say:

"• • • The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement was voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that, from causes which the law treats as legally sufficient to engender in the mind of the accused hope *or fear* in respect to the crime charged, the accused *was not involuntarily impelled* to make a statement when *but for the improper influences he would have remained silent.* • • • ." (Italics added).

and:

"• • • A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; *for the law cannot measure the forces of the influence used, or decide upon the effect upon the mind of the prisoner,* and therefore excludes the declaration *if any degree of influence has been exerted.*" (Italics added).

Certainly the improper influences and strange circumstances of petitioner's arrest does show a very definite relation between the arrest and the confession, for here was a cleverly contrived scheme by the Narcotic Agents to obtain a confession by trickery and psychological coercion from petitioner, and in the presence of witnesses.

How else can the disguise and continued masquerade of Agent Gaffney at this crucial point be explained? Why else was petitioner taken hurriedly from his home—without being permitted to properly dress, or even advise his family of his plight—and why was a lie detector test even suggested, if this was simply an ordinary routine arrest for a past violation? And, why was petitioner taken

directly to the Headquarters of the Narcotic Bureau, instead of immediately before a magistrate, if the case *was* complete and *prior evidence* sufficient in the minds of the agents?

Perhaps one not versed in the law might ask had a warrant been obtained, would the result have been different. Those familiar with the law know this is not the test. And, it is quite possible that had Agents Barber and Thomas been armed with a proper arrest warrant on this morning in May, and had Agent Gaffney continued as he did, with his pose of a merchant seaman, and had petitioner been hurried from his home, without being permitted to properly dress, and say goodbye to his family, and taken to the Narcotic Bureau in downtown Atlanta, the result might have been the same. That cannot now be answered. But, it is also entirely possible and quite probable, that had an arrest warrant been issued by a magistrate on proper showing, and had petitioner been taken into orderly and lawful custody that he would have been advised of his constitutional right to remain silent —to have the benefit and presence of counsel, and under such a proper and orderly arrest one can even hope he would have been allowed to properly dress and to advise his family of the situation, and why he was being taken from their home. Certainly after two weeks of waiting, there was now no sudden emergency and no necessity to hurry petitioner off to jail. But—whether or not he would have been so advised of his legal rights under an orderly and lawful arrest is also unknown. However, it was his right and protection under the Constitution of the United States.

The agents in this case, as the agents in the case of

United States vs. Coplon, supra, had ample time and opportunity in which to obtain a lawful warrant, and here, as in the Coplon case they too made everything ready, *except the one condition which would have made the arrest lawful; a warrant.*

For the two agents who did arrest petitioner had no personal knowledge of the alleged crime, and Agent Gaffney did not participate in the arrest. He was sitting in an automobile, still posing as a merchant seaman. He testified on cross examination:

> "I did not identify myself correctly *until he had admitted to the agent* that he had sold me narcotics and on two occasions. *At that point there was no further reason to go on with the ruse.* I identified myself." (R. 40) (Italics added)

The Fifth Circuit Court of Appeals in affirming this conviction further said:

> "Detection of traffickers and collection of evidence is exceedingly difficult."

This may be true, but petitioner respectfully submits that there is no such exception in the Constitution authorizing a suspension of constitutional rights because of hardships on agents of the Government.

Furthermore, the penalty imposed by Congress, being severe, should in itself cause the judiciary to be all the more careful to guard against convictions based upon anything other than lawfully obtained evidence.

If the evidence obtained in the cases of Giordenello vs. United States and United States vs. Coplon, supra, was obtained illegally, and would not be admissible in evidence, how then can the Government logically con-

tend that the evidence obtained from petitioner was *NOT* inadmissible?

Surely it would be a tragic paradox if the admissibility of evidence obtained by Agents of the Government without proper authority would be determined by the type of evidence—and not by the illegal arrest.

(2) In support of his plea of Not Guilty, petitioner attempted to introduce evidence of good character to show that he was not the type man likely to commit crime.

Virlyn Smith testified that he lived and conducted a business in Fairburn, Georgia. That he had known petitioner for approximately twenty-three years and that petitioner had formerly lived in Fairburn. That they had attended school together, and he had seen him frequently through the years. That petitioner visited his (petitioner's) parents in Fairburn weekly, and that he saw him nearly every Sunday. That he believed he knew his general reputation and character.

The district attorney objected to his testifying to the general reputation on the grounds that the witness did not qualify as to "his reputation in the community in which the defendant lives." (R. 118.)

Whereupon, the Court questioned the witness as follows: (R. 121).

Q. Let me ask the witness this: Do you know whether he is known personally to a large number of people in Fairburn?

A. Yes, he is.

Q. He knows a lot of people there?

A. Yes, sir.

Q. And have you ever heard people there speak of him or refer to him as knowing him?

A. Well, no sir, I never had occasion to get into any conversation with anybody there about him, but I think *he would be as well known there as I am, living there.* (Italics added)

Q. How can you say that you know the reputation of a man in the community if *you have never heard anybody say anything about him?* (Italics added.)

A. Well, I know him myself.

Q. You know him yourself?

A. Yes, sir, I am speaking for me, not for the community.

Q. If you are giving your personal opinion of the man, that is not what the law permits. It is what people generally say about a person that is involved.

A. I don't know that I could speak for the people in my community.

Q. *If you have not heard him discussed by people there one way or another, I don't think you could give his reputation*, you could give your own opinion, but that is not what the law permits in a case like this. (Italics added.)

A. I am afraid anything I would say would be my opinion. I don't think I would be qualified to give the opinion of the people in my town.

The Court: I don't think he has qualified as a character witness, Mr. Fincher.

Mr. Fincher: Come down, Mr. Smith.

Petitioner respectfully contends that this witness did qualify and it was prejudicial and harmful error to refuse to allow his testimony and deprived him of a substantial right, and the defense of good character.

True, the witness did testify that he could not speak for the people of his community, *but he also testified that he had never heard anything said about the petitioner, one way or another.* Certainly his opinion was based on the fact that he *had never heard him discussed*, which is negative evidence. In testing the standard, does the law require that a witness discuss the reputation of an accused with other people, or is it not enough to meet the rule that the fact that he has heard nothing derogatory, proof of itself of the accused's good character? The fact that no reproach has been made or known to have been uttered against one's character may be the very best evidence that his reputation is good. It has been said:

> "* * * It is not always essential that a witness to the reputation of the accused have resided in the same community with the defendant. Accordingly evidence which tends to establish the general character or reputation of a person as gathered from all those who have had an opportunity regularly and for a sufficient period of time to make a reasonable comprehensive estimate should be admissible. *The fact that a witness has never heard the matter discussed does not prevent his testifying to the general reputation of an accused person for peace and violence in the community.*" (Italics added). Am. Jur. Vol. 20, Sec. 329, P. 309, citing Commonwealth vs. Gaines 167 Pa. Super. 485—75 A 2nd. 617, State vs. Cavener 356 Mo. 602, 202 S.W. 2nd 869.

One's neighborhood extends as far as one is well known.

Pethel vs. State, 89 Ga. App. 8, 78 S.E. 2nd 428; Kelly vs. Proctor, 41 N.H. 139; Dupree vs. State, 33 Ala. 380; Griffin vs. State, 14 Ohio St. 55; People vs. Lyons, 51 Mich. 215.

In Corpus Juris Secundum, Vol. 22, Sec. 677 (c) on page 1073 we find the following:

"Generally, inquiry into accused's character may extend and is confined to proof of reputation in the community where he has lived or has been known * * * but it is held that inquiry may also relate to any society or neighborhood where he has a well known or established reputation."

And in the same Section on page 1074:

"(d) A witness may testify that although he was in a position to hear what was said about the accused, he had never heard anyone speak against his character, and the absence of public discussion is generally held as a proper basis for the statement that accused's reputation is good."

Citing among other decisions: VALENT VS. STATE, 138 Atlantic 643, 3 W.W. Harr. (Del) 407.

The Fifth Circuit Court of Appeals in affirming this case failed to recognize the principle above and the principle as stated by this Court in the case of Michelson vs. United States, 69 S. Ct. 213:

"(12-13) * * * However, the witness must qualify to give an opinion by showing such acquaintance with the defendant, the community in which he has lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is regarded. To require affirmative knowledge

> of the reputation may seem inconsistent with the latitude given to the witness to testify when all he can say of the reputation is that he has "heard nothing against defendant." This is permitted upon assumption that, if no ill is reported of one, his reputation must be good. But this answer is accepted only from a witness, whose knowledge of defendant's habitat and surroundings is intimate enough so that his failure to hear of any relevant ill repute is an assurance that no ugly rumors were about."

The Fifth Circuit Court of Appeals said:

> "Smith's testimony is open to several interpretations. If it means that Smith had never heard the people of his community speak ill of Dailey, it was admissible. But the trial judge concluded that Smith was unwilling to testify as to Dailey's reputation in Fairburn. In the circumstances we cannot say the trial judge abused his discretion."

Petitioner respectfully submits that Smith *was* willing to swear that petitioner *was well known in the community, and that he had never heard his reputation discussed*. That did qualify him as a character witness under the authorities cited, and petitioner was denied the substantial right of the defense of good character, which could have created a doubt as to his guilt.

Perhaps the Government could have on cross examination been permitted to show that Smtih had never heard petitioner's reputation discussed, and could have perhaps argued this fact to the jury. But if, as the Fifth Circuit Court of Appeals says, the testimony is subject to several interpretations, then it would be a question for the jury. That the witness had not heard the reputation discussed would not affect the admissibility, but only the weight such evidence is entitled to receive.

Petitioner prays his petition for certiorari be granted, and the errors complained of considered and corrected.

Respectfully submitted.

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APPENDIX "A"

JUDGMENT

Extract from the Minutes of December 23, 1958

WILLIE HUGH DAILEY,

No. 16849

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16849

WILLIE HUGH DAILEY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(December 23, 1958.)

Before RIVES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: Willie Hugh Dailey was indicted, tried, and convicted on two counts of violating the narcotic laws. 26 USCA 4722, 5705 (a). He was sentenced to five years on each count, the sentences to run concurrently. We affirm the judgment.

Dailey was a pharmacist for a drugstore in Atlanta, Georgia. April 16, 1957, without a prescription, Dailey

sold twenty tablets of one-grain morphine sulphate to a merchant seaman for $100. The profit is big in an illegal sale of narcotics; the legitimate retail price for twenty morphine tablets is less than a dollar. Dailey passed the tablets to the seaman in a toothpaste box. April 25, 1957, the merchant seaman made a second purchase of twenty tablets. These too were hidden in a toothpaste box.

The merchant seaman turned out to be George Gaffney, District Supervisor for the United States Bureau of Narcotics for the Southeastern States. Arrangements for his purchases were made by telephone calls—monitored—from a narcotics informer to Dailey.

Gaffney worked on the case with federal narcotic agents R. H. Thomas and E. R. Barber. They were not present in the store when he bought the morphine. They were close by. In each instance after Gaffney left the store they went with him to the Narcotic Bureau office. There he turned over the morphine tablets to them to be chemically analyzed.

May 9, 1957, two weeks after the last purchase, Barber, Thomas, and Gaffney drove out to Dailey's home in Hapeville, a suburb of Atlanta. Gaffney was still disguised as a merchant seaman. Barber and Thomas arrested Dailey, telling him to get in their automobile. They had no warrant for his arrest. They drove to the Narcotic Bureau office, a distance of about ten miles from Dailey's home. On arriving at the office he was afforded immediately the opportunity of calling an attorney and a bondsman. The record does not show how long Dailey and the agents remained at the Narcotic Bureau. After a

stay there, he was taken to the office of the United States Commissioner.

During the ride from Hapeville and shortly after Dailey entered the automobile, Barber asked Dailey if he had ever seen Gaffney before. Dailey replied that he had not. Barber said that Gaffney had admitted purchasing morphine illegally from Dailey. Again Dailey denied ever having seen Gaffney. Thomas asked if Dailey would care to take a lie detector test. At that point Dailey admitted the sales to Gaffney. His confession was not reduced to writing. At the trial, over objections, the Court admitted testimony as to Dailey's confession.

I.

The defendant contends that his confession was inadmissible, because it was obtained while he was under illegal arrest; illegal, because he was arrested without a warrant. He argues that failure of the government agents to obtain a warrant when they had fourteen days within which to act after the last sale to Gaffney shows that the agents did not think that they had probable cause, and the record shows no circumstances to justify arrest without a warrant.

The Fourth Amendment protects citizens from unreasonable searches and seizures and from the issuance of warrants without probable cause.[1] It does not prohibit

[1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." 4th Amendment, United States Constitution. Generally, then, an arrest should be accompanied by a warrant. See Gatewood v. U. S., D.C. Cir., 1953, 209 F.2d 789.

an arrest without a warrant, when there is reasonable or probable cause for the arrest. *Mills v. U. S.*, D.C. Cir. 1952, 196 F.2d 600, cert. den. 344 U.S. 826.

Congress specifically authorizes arrests without warrants—for narcotic violations. The Narcotic Control Act of 1956 provides, 26 USCA §7607:

> "The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, . . . may . . .
>
> "(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the persons to be arrested has committed or is committing such violation."

The safeguard is the requirement that the arresting officer have "reasonable grounds to believe that the person to be arrested has committed or is committing" a violation of the narcotic laws. The language of the Act is clear. There is no occasion therefore to complicate the problem; no need to speculate as to implications that may or may not be implicit in the Act as we might ferret out the legislative history. The act is an obvious attempt to give law enforcement officers more latitude than they have had in making arrests without warrants. There is nothing in the statute requiring that an arrest be made immediately following the arresting officer's knowledge

of probable cause for arrest. If an arresting officer has reasonable grounds to believe that a person has violated the narcotic laws, he may defer the arrest for a day, a week, two weeks, or perhaps longer. The narcotic traffic is dirty business. Detection of traffickers and collection of evidence is exceedingly difficult. It is within the province of Congress to avoid the necessity for a warrant. If to begin with there is reasonable ground for an arresting officer to believe that the person to be arrested has violated the narcotic laws. In this case the record shows that the agents had abundant grounds for such belief.

Dailey labors to bring this case within the reach of the McNabb,[2] Upshaw,[3] Fikes,[4] and Mallory[5] cases. They have no application. Here the arrest and detention were legal. Even if the arrest and detention were illegal, we take the position that the confession was admissible, since there is no evidence that the confession was induced by the detention. There is of course loose dicta, discoverable in some cases, that illegal detention, standing alone, is sufficient to destroy the effect of a disclosure or admission made during the detention. An examination of the cases, however, shows that in every instance there was something more than detention standing alone. There was physical or mental coercion, or a simple-minded illiterate who was taken advantage of by police officers, or there

2 McNabb v. United States, 1943, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819.
3 Upshaw v. United States, 1948, 335 U.S. 410, 69 S.Ct. 170, 93 L.Ed. 100.
4 Fikes v. Alabama, 1956, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed. 2d 246.
5 Mallory v. United States, 1957, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed. 2d 1479.

was a long, steady, gruelling interrogation[6] of the accused.

Here, Dailey was not a poor, ignorant, simple soul. He was not frightened by the police. He confessed quickly and voluntarily. He argues that detention was illegal since he was not brought immediately to the United States Commissioner. But he admitted his narcotic sales before he could be brought anywhere. In this respect the case falls within the scope of *Mitchell v. United States*, 1944, 322 U.S. 65, 64 S.Ct. 896, 88 L.Ed. 1140.[7]

As we read the record, there was no necessary relation between the arrest and the confession.[8] When Dailey was confronted with Gaffney, the federal agent to whom he had sold morphine illegally, he knew all too well that he had reached the end of the road. He was caught. He gave up. He confessed. We think that the testimony as to his confession was admissible.

II.

Dailey attempted to prove good character through Virlyn Smith, a resident of Fairburn, Georgia. Dailey formerly lived in Fairburn. His parents still lived there.

6 For instance, in the McNabb case, the men "were arrested in the middle of the night at their home . . . [T]hey were put in a barren cell and kept there for fourteen hours". Upshaw had been gruelled for 30 hours after an arrest without a warrant. Fikes was an uneducated Negro. Again, in Mallory, there was relentless questioning until a confession was obtained, "the third degree" was used, Mallory was "a nineteen-year-old lad of limited intelligence."

7 In the Mitchell case, the defendant promptly and spontaneously admitted his guilt within a few minutes after his arrival at the police station. Dailey's confession was, as in the Mitchell case, "the offspring of reasoned choice". Also, Dailey, just as in the Mitchell case, confessed before the illegal detention began.

8 In Mitchell, the court said "there was no disclosure induced by illegal detention". We find the same thing to be true of Dailey's confession.

and he visited them nearly every Sunday. The trial judge examined Smith in a voir dire hearing. Smith was asked if he knew the appellant's general character and reputation. He answered that he could speak for himself, "not for the community"; "I don't know that I could speak for the people in my community"; "I don't think I would be qualified to give the opinion of the people in my town". The trial judge then excused Smith as a witness.

Smith's testimony is open to several interpretations. If it means that Smith had never heard the people of his community speak ill of Dailey, it was admissible. But the trial judge concluded that Smith was unwilling to testify as to Dailey's reputation in Fairburn. In the circumstances we cannot say that the trial judge abused his discretion. *French v. United States*, 5 Cir., 1956, 232 F.2d 736, cert. den. 352 U.S. 851, 1 L.Ed. 2d 61, 77 S.Ct. 72.

Judgment is

AFFIRMED.

/s/ Edward W. Wadsworth

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

A true copy

Test:

(SEAL)

February 18, 1959

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No. 751

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIE HUGH DAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 261 F. 2d 870.

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1958. A petition for rehearing was denied on February 11, 1959. The petition for a writ of certiorari was filed on March 5, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether narcotics agents had authority to arrest petitioner without a warrant on knowledge that a narcotics offense had two weeks previously been committed by petitioner, so that admissions made immediately after the arrest were properly admitted in evidence.

2. Whether the trial court properly refused to receive testimony of a proposed character witness on the ground that the witness was unable to testify to petitioner's reputation.

STATEMENT

In the United States District Court for the Southern District of Georgia, petitioner was convicted on two counts charging two sales of morphine without written order form on two different dates, in violation of 26 U.S.C. (Supp. V) 4705(a). He was given concurrent sentences of five years on each count (R. 1-2, 155-156). On appeal, the judgment was affirmed.

The evidence for the government showed that federal narcotic agent Gaffney, posing as a merchant seaman, went to the pharmacy where petitioner was employed on April 16, 1957.[1] He showed petitioner a mariner's identification card and gave petitioner $100. Petitioner handed Gaffney a toothpaste carton inside of which were 20 tablets of a substance subsequently identified as morphine (R. 5-10, 71-72). On

[1] A special employee had previously called petitioner by telephone saying he was sending over a friend with a hundred dollars to spend (R. 62-64).

April 25, for $100, petitioner again sold Gaffney twenty grains of morphine, again enclosed in a tooth-paste carton (R. 10-12, 72).

On May 9, 1957, at around 11:00 A.M. (R. 85), two other agents went to petitioner's home, asked him to accompany them, and placed him under arrest (R. 13, 51). They brought petitioner to their car where Gaffney, still posing as a seaman, was seated. The agents asked petitioner whether he had ever seen Gaffney before. Petitioner denied having done so. The agents said Gaffney had been picked up with narcotics which he had obtained from petitioner. Petitioner denied this. When asked if he would take a lie detector test, petitioner admitted the sale. He also admitted sales to another person (R. 16, 21-22, 36-37, 59-60).

ARGUMENT

1. Petitioner contends that, since the agents had time to get a warrant in view of the two-week interval between the last sale to Gaffney and the arrest, his arrest without a warrant was illegal and, consequently, that his oral admissions, made immediately after the arrest, were inadmissible. However, by the Narcotic Control Act of 1956, 26 U.S.C. (Supp. V) 7607, Congress specifically conferred upon narcotic agents the power to "make arrests without warrant for violations of any law of the United States relating to narcotic drugs * * * where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested

has committed or is committing such violation."[2] The legislative history shows that this was designed to give narcotics agents powers comparable to those presently enjoyed by agents of the F.B.I. (Sen. Rep. 1997, 84th Cong., 2nd Sess., pp. 14-15), which are in turn equivalent to the powers of police officers at common law.[3] Those common law powers include the right to arrest without a warrant, on reasonable cause to believe that a felony has been committed by the person arrested, even though the arresting officers had time to get a warrant. *United States* v. *Perez*, 242 F. 2d 867 (C.A. 2), certiorari denied, 354 U.S. 941. At the time of the adoption of the Constitution and ever since, except when the rule has been changed by statute, it has been established law, in England and in the federal and state courts, that a peace officer may arrest on reasonable cause to believe that a felony has been committed and that the person arrested has committed it. 2 Hale, *Pleas of the Crown* (1847), pp. 84-97; 4 Blackstone, *Commentaries* (1900), 290-295; 2 Hawkins, *Pleas of the Crown* (1787), pp. 128-130; Wilgus *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 673, particularly at 548-

[2] This statute was not in effect at the time of the arrest involved in *Giordenello* v. *United States*, 357 U.S. 480.

[3] At the time of the decision in *United States* v. *Coplon*, 185 F. 2d 629 (C.A. 2), certiorari denied, 342 U.S. 920 (on which petitioner relies, Pet. 8), the F.B.I. had more limited powers of arrest. The statute was thereafter amended to give F.B.I. agents the general power to arrest without a warrant on reasonable ground to believe that a felony had been committed. 18 U.S.C. 3052, as amended by the Act of January 10, 1951, 64 Stat. 1239.

550 and 685-689; *Carroll* v. *United States*, 267 U.S. 132, 156-157; *Kurtz* v. *Moffitt*, 115 U.S. 487, 504; *Rohan* v. *Sawin*, 5 Cush. (Mass.) 281, 284-285; *Wakely* v. *Hart*, 6 Binn. (Pa.) 316, 318-319; *Samuel* v. *Payne*, 1 *Dougl.* 359 (K.B.); *Beckwith* v. *Philby*, 6 B. & C. 635 (K.B.) As Wilgus makes clear, *op. cit. supra*, the power to arrest without a warrant preceded the development of warrant procedure and was never supplanted by the warrant procedure. There has never been any requirement that the arrest be made immediately after the officers obtain the probable cause to make the arrest. It follows that, since the arrest here was legal, and since the admissions were made in the car immediately after the arrest, before there was any possibility of arraigning petitioner, there was no reason to exclude the admissions.

2. In his defense, petitioner called one Virlyn B. Smith, an automobile dealer in Fairburn, Georgia, where petitioner's parents lived (R. 118, 120). He testified that he had known petitioner since 1935, had gone to school with petitioner and had seen him frequently since that time, nearly every Sunday when petitioner visited his mother (R. 120-121).

On inquiry by the court the following occurred (R. 121-122):

> Q. Let me ask the witness this: Do you know whether he is known personally to a large number of people in Fairburn
>
> A. Yes, he is.
>
> Q. He knows a lot of people there?
>
> A. Yes, sir.
>
> Q. And have you ever heard people there speak of him or refer to him as knowing him?

A. Well, no, sir, I never had occasion to get into any conversation with anybody there about him, but I think he would be as well known there as I am, living there.

Q. How can you say that you know the reputation of a man in the community if you have never heard any body say anything about him?

A. Well, I know him myself.

Q. You know him yourself?

A. Yes, sir, I am speaking for me, not for the community.

Q. If you are giving your personal opinion of the man, that is not what the law permits. It is what people generally say about a person that is involved.

A. I don't know that I could speak for the people in my community.

Q. If you have not heard him discussed by people there one way or another, I don't think you could give his reputation, you could give your own opinion, but that is not what the law permits in a case like this.

A. I am afraid anything I would say would be my opinion. I don't think I would be qualified to give the opinion of the people of my town.

The court ruled that the witness had not qualified as a character witness (R. 122).

The judge had previously explained that, although the decisions usually referred to a man's reputation in the community in which he resides, he had adopted the rule "that if in any locality a man had made a reputation, then that reputation was subject to being investigated" (R. 119-120). He subsequently explained that "the only reason that I ruled out the testimony of your witness was that he said the

defendant came out to Fairburn occasionally, and he didn't know what, if any people that he knew there, he had never heard his reputation discussed one way or another. He was just absolutely vacant on the idea of his having any reputation. Now, that is the whole thing. I don't know any more, any better way to say more clearly than to say that you can prove a man's reputation in any locality where he has a reputation, but if it is a place where he goes seldom, and has no reputation, then there is no reputation to prove" (R. 144-145). It is thus clear that the judge made his ruling because of his finding that the witness did not know petitioner's reputation in the community, and not, as petitioner claims, because the witness had heard nothing bad about petitioner. This is, we submit, a logical interpretation of the testimony quoted above, and a correct ruling. As this Court said in *Michelson* v. *United States*, 335 U.S. 469, 478-489:

> * * * To require affirmative knowledge of the reputation may seem inconsistent with the latitude given to the witness to testify when all he can say of the reputation is that he has "heard nothing against defendant." This is permitted upon assumption that, if no ill is reported of one, his reputation must be good. But this answer is accepted only from a witness whose knowledge of defendant's habitat and surroundings is intimate enough so that his failure to hear of any relevant ill repute is an assurance that no ugly rumors were about.

Here the witness, who had known petitioner in school, but saw petitioner in the community only once a

week when he visited his parents, was not in a position to have the intimate knowledge which the law requires.[4]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

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MARCH 1959.

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[4] The petitioner called another character witness (R. 145-146) and the judge instructed the jury as to the proper weight to be accorded such testimony (R. 148).

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